

GUIDANCE ON CHOOSING THE APPROPRIATE FORUM IN CLEAN AIR ACT STATIONARY SOURCE CIVIL ENFORCEMENT ACTIONS

Issued October 29, 1991

This guidance document discusses the factors to consider when determining whether the administrative or judicial forum is most appropriate for a Clean Air Act (CAA) stationary source civil enforcement action.¹

EPA's enforcement options have been expanded by the CAA's new administrative penalty authority. It is important that the Agency view this new authority as a supplement to, not a replacement of, the Agency's existing civil judicial enforcement program. The administrative forum will provide a more streamlined enforcement option, suitable for addressing many violations. There are, however, statutory limits on the use of administrative remedies. Long-term, court-supervised injunctive relief is available only in the judicial forum. Enforcement actions that will require extensive post-filing discovery should in most circumstances be filed in the judicial forum, both to take advantage of broad ranging civil discovery and to keep administrative cases moving expeditiously and without extensive adjustment of pleaded penalty amounts. Consequently, in many instances judicial enforcement will still be preferable or required. It is therefore necessary that the factors discussed below be considered when deciding in which forum to proceed with an enforcement action.²

The factors set out below are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

1. Statutory Limitations

Section 113(d)(1) of the Clean Air Act generally limits EPA's administrative authority to cases where:

the total penalty sought does not exceed \$200,000, and the first alleged date of violation occurred: no more than twelve months prior to the initiation of the administrative action.³

These limitations will determine which enforcement actions are initially eligible for administrative enforcement.⁴ However, it should not be assumed that all such actions can in fact be handled administratively. A substantial number of actions that fit within these statutory limits may still require filing in the judicial forum depending on the nature of the violations and the other enforcement remedies (e.g., injunctive relief) involved.

2. Multiple and Repeat Violations

Multiple violations of different regulatory requirements can be pursued through an administrative action provided that the penalty sought, calculated in accordance with the CAA Stationary Source Civil Penalty Policy, does not exceed the \$200,000 statutory cap. A determination as to whether the cap has been exceeded must be made based on the number of violations the Agency can plead at that time. For example, if the Agency obtains an inspection report that reveals multiple violations at a facility resulting in a calculated penalty of less than \$200,000, an administrative action is permissible. However, if the report (or other evidence of violation that the Agency possesses at that same time) reveals multiple violations resulting in a calculated penalty of over \$200,000, the violations should be pursued through a judicial action. The Agency should neither split the violations (regardless of type) among two administrative actions each capable of being pled at under \$200,000, nor forego the pleading of violations with reasonable evidentiary support in order to bring a single administrative action within the statutory cap.

However, if the Agency brings an administrative action against a facility, and then at a later date obtains evidence revealing that the facility has committed other violations which, if combined with the violations already pled, would exceed a calculated penalty of \$200,000, then a separate administrative action can be brought against the facility to address the newly discovered violations. If the newly discovered violations can be pled in the previously potential recalcitrance and the complexity of the relief sought should be considered. If, based on the violator's compliance history and its conduct in: the current and past enforcement actions, it seems probable that the violator will not obey a compliance order, then court-ordered and supervised, injunctive relief should be sought. In most circumstances, court-supervised injunctive relief should also be sought where the violator will be required to perform complex or capital-intensive compliance activities, since these situations present an increased likelihood for disputes over satisfactory performance and for missed compliance deadlines.

4. Evidence of a Criminal Violation

Generally, criminal violations must be addressed in a criminal judicial action. A separate civil action to address civil violations can be pursued in the judicial or administrative forum in accordance with the EPA's June 15, 1989 guidance on Procedures for Requesting and Obtaining Approval of Parallel Proceedings. For example, a judicial action can be brought where a violator's activities present an immediate, substantial danger to human health and require a prompt injunction to halt the danger.

5. Extensive Post-Filing Discovery

In most circumstances, enforcement actions that will require extensive post-filing

discovery should be directed to the judicial forum. A judicial action will provide the Agency with broad-ranging discovery rights and obligations under the Federal Rules of Civil Procedure; in contrast, the administrative forum provides very limited post-filing discovery under 40 CFR Part 22.22. Moreover, extensive post-filing case development may result in extensive adjustment of penalty amounts, which in an administrative action would also oftentimes necessitate extensive amendment of the penalty amounts pled in the complaint.

6. New Legal Issues

When an enforcement action involves novel legal issues, the Agency must carefully weigh the decision to pursue the action in the administrative or judicial forum. A favorable opinion in federal district court will set a substantially stronger beneficial precedent than will a favorable administrative opinion. However, when an enforcement action arises in a judicial district which has been hostile to the Agency's interests in the past, the action might be better brought in the administrative forum even if it involves precedential issues.

1 Certain relatively minor violations may be best addressed through field citations. Guidance for the field citation program through field citations. Guidance will be issued sometime in 1993.

2 These factors are not an exhaustive list. Any relevant factors~such as case-specific federal/State coordination issues} should also be considered.

3 The current EPA policy is to address administratively only those alleged violations dated within twelve months of the filing of the administrative complaint under EPA's Consolidated Rules of Practice, 40 CFR Part 22.

4 Both of these limitations can be altered by a joint determination by EPA and the Department of Justice.

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